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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. DANIEL COLVIN, Defendant and Appellant.	B214034 (Los Angeles County Super. Ct. No. TA095220)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ronald V. Skyers, Judge. Affirmed as modified.

Mark Alan Hart, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr. and Dana M. Ali, Deputy Attorneys General, for Plaintiff and Respondent.

This appeal arises from a criminal case involving a drive-by shooting which left one victim dead and another wounded. Based on evidence that he aided and abetted the shooting, a jury convicted Daniel Colvin of first degree murder (Pen. Code, § 187, subd. (a)), with ancillary findings that a principal discharged a handgun causing death, discharged a handgun, and used a handgun, and that the premeditated murder was committed to benefit a criminal street gang (Pen. Code, §§ 12022.53, subds. (b)-(e); 186.22 (b)(1)(c)). The jury also found Colvin guilty of attempted premeditated murder (Pen. Code, § 664, 187, subd. (a)), with findings that a principal discharged a handgun and caused great bodily injury, discharged a handgun, and used a handgun, and that the crime was committed for the benefit of a criminal street gang (Pen. Code, §§ 12022.53, subds. (b)-(e); 186.22 (b)(1)(c)). The trial court sentenced Colvin to a total term of 50 years to life in the state prison. We affirm with directions to correct custody credits.

FACTS

The Gang Rivalry Setting

On January 27, 2008, members of the East Coast Crips gang and the Grape Street Crips gang were at a party at a rented hall on East Florence Avenue. At about 1:00 in the morning, several Grape Street gang members ended up being shot, two of whom, Brandon "BL" Bullard and Bruce "Tanky" Adams, were killed. According to an investigating police officer, it was certain there would be retaliation for Bullard's killing in light of his status in the Grape Street Crips gang. Shortly before noon, a member of the East Coast Crips gang, Ezell "Easy" Ford, was shot near 66th Street and Broadway. Now it was back to the East Coast gang's turn.

The Charged Offenses

At about 1:00 in the afternoon on January 27, 2008, two members of the Grape Street gang, Mario "Gus" Proctor and Rashad Harris, were standing on the front porch of a house on 101st Street near Grape Street in the Jordon Downs housing project when a black Impala drove down the street. The Impala had tinted windows, a type of "tail," and paper license places with black and gold letters. A minute after it first passed, the Impala came down the street again, this time stopping in the roadway across from the house on

101st Street where Proctor and Harris were standing. A black male, about 18 to 23 years old and weighing about 170 pounds, got out of the front passenger seat of the Impala, pointed a semi-automatic handgun over the top of the car, and fired several shots toward Proctor and Harris. Proctor was killed by gunshot wounds to his head, arm and knee; Harris suffered a gunshot wound to his hand. Shortly after the shooting, police reviewed videotape from cameras in the Jordon Downs housing project. The videotape recorded a black car driving on 101st Street near Grape Street and then making a U-turn. The black car had a raised object on the trunk of the car.

On January 29, 2008, police arrested Daniel Colvin at his house, and impounded his car – an Impala with dark tinted windows, and an object on the back of the trunk. During a search of Colvin's house, police found two paper license plates with black and gold lettering. Police arrested Cedric Johnson at his apartment two days later. During a search of the premises, officers found several items showing Johnson's connection to the East Coast Crips gang, including photographs of persons making gang signs, and papers with East Coast gang writing. They also recovered a document that had been printed from the "L.A. Times homicide blog." It reported the killing of Brandon Bullard. Another two-page document contained a history on gangs. Apart from the gang materials, Colvin and Johnson were both self-admitted members of the East Coast Crips gang.

Colvin and Johnson were placed in jail cells where their conversations and phone calls were secretly recorded. During the course of several conversations between Colvin and Johnson, and between Colvin and other persons, and Johnson and other persons, both Colvin and Johnson made statements indicating that they had been in the car involved in the shooting of Proctor and Harris. During one conversation, Colvin admitted he was the driver of the car. In another, Colvin said that at his request, his mother had disposed of the gun used in the murder.[1]

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[1] A series of recordings of the jailhouse conversations were introduced at Colvin's trial.

The People filed an information charging Colvin and Johnson with the murder of Proctor (Pen. Code, § 187, subd. (a); count 1), with allegations that a principal discharged a handgun causing death, and that a principal discharged a handgun, and that a principal used a handgun, and that the offense was committed for the benefit of a criminal street gang (Pen. Code, §§ 12022.53, subds. (b)-(e); 186.22 (b)(1)(c)). The information also charged Colvin and Johnson with the attempted murder of Harris (Pen. Code, §§ 664, 187, subd. (a)); count 2), with allegations that a principal discharged a handgun causing great bodily injury, and that a principal discharged a handgun, and that a principal used a handgun, and that the offense was committed for the benefit of a criminal street gang (Pen. Code, §§ 12022.53, subds. (b)-(e); 186.22 (b)(1)(c)).

The People tried the charges against Colvin and Johnson to a single jury where the People presented evidence establishing the facts summarized above. Colvin did not present any defense evidence; Colvin's defense challenged the sufficiency of the evidence showing he shared any intent to kill with the actual shooter, and proffered that it was reasonable to find that Colvin had not known that a shooting was going to occur. The jury convicted Colvin as charged, and the trial court sentenced him to a term of 50 years to life in state prison.[2]

Colvin filed a timely notice of appeal.

DISCUSSION

I. CALCRIM No. 400

Colvin contends his convictions must be reversed because the trial court's aiding and abetting instruction — CALCRIM No. 400 — violated his constitutional right to due process, and his constitutional right to a jury trial. According to Colvin, it is reasonable to conclude that the jurors understood the law to require them to fix Colvin's liability as an aider and abettor at a level of guilt "equal" to the guilt of the shooter. In other words,

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[2] The jury also convicted Johnson as charged, and the trial court also sentenced Johnson to a total term of 50 years in state prison. Last year, we rejected Johnson's appeal, and affirmed his judgment. (*People v. Johnson* (Nov. 2, 2009, B212011) [nonpub. opn.].)

Colvin argues CALCRIM No. 400 told his jury that, in the event they found the shooter to be guilty of first degree murder, they were required to find that any person who aided and abetted the shooter was also guilty of first degree murder. This created error, says Colvin, because a jury has within its power to convict an aider and abettor of a lesser offense than the actual perpetrator of a crime. We agree with Colvin's legal analysis of CALCRIM No. 400's deficiencies in the murder context, but he has not persuaded us that the error compels the reversal of his convictions.

CALCRIM No. 400, as given by the court at Colvin's trial, instructed: "A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. I will call that person the perpetrator. Two, he or she may have aided and abetted a perpetrator, who directly committed the crime. A person is equally guilty of the crime whether he or she committed it personally or aided and abetted the perpetrator who committed it."

As a preliminary matter, we conclude that Colvin has waived the issue on appeal. In *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1163 (*Samaniego*), Division Two of our court held that the defendant waived his objection to CALCRIM No. 400 because a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language. The court stated: "CALCRIM No. 400 is generally an accurate statement of law, though misleading in this case. [The defendant] was therefore obligated to request modification or clarification and, having failed to have done so, forfeited this contention." (*Samaniego, supra*, at p. 1163.) Even if this contention had been preserved for appeal, we would nonetheless find that there was no prejudicial error.

Colvin argues CALCRIM No. 400, as given at his trial, was problematic because it told jurors that a person is "equally" guilty of a crime whether he committed it personally or aided and abetted the direct perpetrator. *Samaniego* is instructive on this point. As Division Two explained:

> " '[W]hen a person, with the mental state necessary for an aider and abettor, helps or induces another to kill, that person's guilt is determined by

> the combined acts of all the participants as well as that person's own *mens rea*. If that person's *mens rea* is more culpable than another's, that person's guilt may be greater even if the other might be deemed the actual perpetrator.' [(*People v. McCoy* (2001) 25 Cal.4th 1111, 1117, 1122 (*McCoy*).] ' "[O]nce it is proved that 'the principal caused an *actus reus*, the liability of each of the secondary parties should be assessed according to his own *mens rea*.' " ' [Citation.] When the offense is a specific intent offense, ' "the accomplice must 'share the specific intent of the perpetrator;' this occurs when the accomplice 'knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime.' " ' [Citation.] In the case of murder, the aider and abettor 'must know and share the murderous intent of the actual perpetrator.' " [Citation.]
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> "Though *McCoy* concluded that an aider and abettor could be guilty of a greater offense than the direct perpetrator, its reasoning leads inexorably to the further conclusion that an aider and abettor's guilt may also be less than the perpetrator's, if the aider and abettor has a less culpable mental state. . . . Consequently, CALCRIM No. 400's direction that '[a] person is *equally guilty* of the crime . . . whether he or she committed it personally or aided and abetted the perpetrator who committed it' [citation], while generally correct . . . , is misleading [in a murder case] and should [be] modified [accordingly]." (*Samaniego, supra*, 172 Cal.App.4th at pp. 1164-1165.)[3]

Although CALCRIM No. 400 may have the potential to misdirect jurors in some murder trials, we find no such potential prejudice in Colvin's current case. To the extent the instructional error affected Colvin's constitutionally guaranteed trial rights, we examine the error under the harmless error test set forth in *Chapman v. California* (1967) 386 U.S. 18, 24. Under this test, we may not find the error was harmless unless we are convinced beyond a reasonable doubt that the jury's verdict would have been the same absent the asserted error. (See. e.g., *Samaniego, supra*, 172 Cal.App.4th at p. 1165.)

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[3] The latest version of CALCRIM No. 400 includes brackets around the word "equally." The current Bench Notes advise: "Before instructing the jury with the bracketed word 'equally,' the court should ascertain whether doing so would be in accord with the . . . principles articulated in *People v. McCoy* (2001) 25 Cal.4th 1111, 1115-1116 . . . and *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1166 . . . ."

We find any error in connection with CALCRIM No. 400 to have been harmless beyond a reasonable doubt because the jurors necessarily resolved the issue of Colvin's mental state against Colvin under other properly given instructions. The trial court did not instruct with CALCRIM No. 400 standing alone. The court further instructed with CALCRIM No. 401, which explained to the jurors that, to prove a defendant is guilty of a crime based on aiding and abetting that crime, the People "must prove" (1) that the defendant "knew that the perpetrator intended to commit the crime," and (2) that, before or during the crime, "the defendant intended to aid and abet the perpetrator in committing the crime." In short, the court's specific instructions trumped the generality found in CALCRIM No. 400. The court also instructed with CALCRIM No. 520, further explaining to the jury: "To prove that the defendant is guilty of [murder], the People must prove that . . . [t]he defendant committed an act that caused the death of another person" and that, "[w]hen the defendant acted, he had a state of mind called malice aforethought." The court also instructed with CALCRIM No. 521, which directed: "The defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation." And the court also instructed the jury on premeditation as a element of the prosecution's first degree murder theory, and instructed that jury that, if the prosecutor did not meet its burden of proving first degree murder, the jurors were required to find the defendant not guilty of first degree murder.

By convicting Colvin of first degree murder under the instructions given, the jury necessarily found that Colvin had acted, either on his own or when aiding and abetting another, willfully and with the intent to kill. We find beyond a reasonable doubt that the jury's findings of guilt would not have been any different had CALCRIM No. 400 been modified to delete any suggestion that the driver was "equally" guilty as the shooter.

The jury's conclusion that Colvin intended to aid and abet premeditated offenses rests on a foundation of overwhelming evidence establishing that Colvin was an active member of the East Coast Crips gang, and that a series of back-and-forth shootings occurred between the Grape Street Crips and the East Coast Crips. Further, that on January 27, 2008, Colvin drove his car into the territory of the Grape Street Crips, that he

drove past the victims, both of whom were members of the Grape Street Crips, that he turned around and drove back to the victims' location, and that he stopped his car directly across from the victims long enough for the shooter to get out of the car and aim over the top of the car at the victims. In addition to the evidence showing a deliberate attack on rival gang members, there were Colvin's recorded conversations, none of which supports a suggestion that he inadvertently got caught up in an unexpected shooting. On the contrary, Colvin's comments show he had wanted to assist a shooting of rivals. Colvin specifically stated in one conversation: "[I]f I would have known there were cameras, I would have gone somewhere else in the Grape hood."

Our conclusion that the trial court's instruction with CALCRIM No. 400, in the form in which it was used, did not prejudice Colvin also resolves his claim that his trial counsel was ineffective because he did not object or seek modification of the instruction. The record belies a conclusion that, had CALCRIM No. 400 been modified, the result of Colvin's trial may have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 686-697 [a defendant's claim that his or her counsel was ineffective has two components: a showing of deficient performance and a showing of prejudice].)

II. Section 12022.53, Subdivision (d), Did Not Violate Double Jeopardy Principles

Colvin contends the imposition of the 25-year enhancement under Penal Code section 12022.53, subdivision (d) — based on the jury's finding attendant to the murder count that a principal discharged a handgun *causing death* — must be vacated because the jury's finding of guilt on the murder charge already encompassed any contemplated punishment for causing the victim's death. We reject Colvin's contention because our Supreme Court has rejected his premise in a similar context. (*People v. Izaguirre* (2007) 42 Cal.4th 126, 130-134; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

III. Presentence Custody Credits

Colvin contends, the People concede, and we find that Colvin is entitled to more actual days presentence custody credits than are reflected in the abstract of judgment. Police arrested Colvin on January 29, 2008, and the trial court sentenced Colvin on

December 10, 2008. The difference is 317 days, not 278, as reflected in the record. A corrected abstract of judgment is appropriate.

DISPOSITION

The trial court is directed to issue a corrected abstract of judgment reflecting Colvin is entitled to 317 actual days in custody. The corrected abstract shall be forwarded to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

BIGELOW, P. J.

We concur:

RUBIN, J.

GRIMES, J.